

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-4117

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-4117

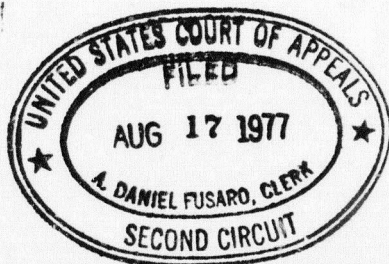
JOSEPH ANASTASIO,
Appellant,

- against -

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

ON APPEAL FROM THE UNITED STATES
TAX COURT

BRIEF FOR APPELLANT



STANLEY PRESSMENT
1746 East 13th Street
Brooklyn, New York 11229

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x
JOSEPH ANASTASIO, :
Appellant :
v. : Docket No. 77-4117
COMMISSIONER OF INTERNAL REVENUE, :
Appellee :
- - - - - x

OPENING BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The finding of fact and opinion of the Tax Court are by a regular opinion, 67 T.C. No. 63 (1977). The opinion is by the Trial Judge Theodore Tannenwald, Jr.

The case involves a deficiency in Federal income tax determined against Appellant Joseph Anastasio (hereinafter called "Joseph") for the taxable year 1970 in the amount of \$61,086.39. The deficiency is based upon the determination by the Commissioner of Internal Revenue that Joseph, a cash basis taxpayer who was a minor in 1970, realized income in that year from a lottery award he won but which was paid to his parents acting as custodians under the New York State Estate, Powers and Trusts Law ("EPTL"); such direction for payment to Joseph's parents stemming from

the provisions of the New York Lottery Law. No part of the lottery award or income earned thereon was paid to Joseph by his parents in 1970 or was otherwise used or made available for his benefit in said year.

The Tax Court determined that Joseph received "sufficient economic and financial benefits" from the award in 1970 to cause him to realize taxable income therefrom in that year. The Tax Court reached this decision despite the uncontroverted facts showing that Joseph, because he was a minor in 1970, could not receive any part of the award unless his parents, in their complete discretion as custodians, determined it was for his "support, maintenance, education, and benefit", or where no distribution was forthcoming from his parents, acting as custodians, Joseph could under the EPTL petition the appropriate State Court for an order directing his parents to pay over such funds as were necessary for his support, maintenance and education. Nor could Joseph under the EPTL assign such funds during the year of the award.

QUESTION PRESENTED

Whether a New York State Lottery award won by a minor, which under the lottery laws of the State of New York is made payable to his parents acting as custodians with powers determined by the EPTL, constitutes income realized by the minor in the taxable year of the award when

no part of the award or income earned thereon is actually or constructively received by the minor during such year.

STATEMENT OF FACTS

All of the facts herein were fully stipulated between the parties in the Tax Court and no controversy exists with respect thereto.

In February, 1970, Joseph who was born on September 1, 1950, purchased in his own name a New York State lottery ticket for \$1.00 which resulted in his winning \$100,000. Under Sec. 9553 (b) of the New York State Lottery Law, because Joseph was a minor at the time of the lottery award, an irrevocable payment of \$100,000 was made by the State of New York by the check dated April 13, 1970 drawn to Carmine and Rafaela Anastasio as custodians for Joseph Anastasio, minor. The said Sec. 9553 (b) provided that Joseph's parents named as custodians "shall have the same duties and powers as a person designated as a custodian in a manner prescribed by Part 4 of Article VII of the Estate, Powers and Trusts Law" of the State of New York.

The following represents the pertinent duties and powers under Sec. 7-4.3 of the EPTL which were accorded to Joseph's parents, as custodians, while holding the lottery award for his benefit:

"(a) The custodian shall collect, hold, manage, invest and reinvest the custodial property.

(b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(c) The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

(d) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of twenty-one years, he shall thereupon deliver or pay it over to the estate of the minor."

The \$100,000 award was used to purchase a Franklin New York Corporation Note dated April 22, 1970, due January 15, 1971 and a Franklin Savings Bond, face value \$52,000 due April 20, 1975, with annual interest at 5%. The total interest earned by the note and bond in 1970 was \$4,581.00. Both aforementioned purchases were made by and in the names of Joseph's parents as custodians under the New York Uniform Gifts to Minors Act.

Joseph's parents filed a Form 1041, United

States Fiduciary Income Tax Return, for the taxable year April 13, 1970 (the date the lottery award was paid to them by the State of New York) to March 31, 1971, and included thereon \$104,581 as gross income. During calendar year 1970 Joseph received no payments with respect to the award from his parents; payment of the entire award and the income earned thereon was made to Josep. by his parents in 1971.

ARGUMENT

All the parties agree that resort must be made to the economic benefit doctrine in order to determine whether Joseph, a cash basis taxpayer, realized taxable income on the award in 1970. The Tax Court, in its opinion, paid lip service to the economic benefit doctrine without defining, elaborating or otherwise setting forth the criteria which determines its application to the instant set of facts. The area of taxability of gambling winnings of a minor, where payment to the minor is inhibited because of the very fact of minority, has only been touched directly upon by one revenue ruling (Rev. Rul. 67-203, 1967-1 CB 105) and a decision by the Tax Court in Stephen W. Pulsifer 64 T.C. 245 (1975). Neither the ruling nor the Pulsifer decision explored the economic benefit doctrine. They both found that a mere statement of its application sufficed.

The decision by the Tax Court in this case is equally cavalier and indeed also renders conclusions of law which are either (1) clearly wrong (see page 14 herein), (2) clearly inconsistent with stated positions previously taken by the Tax Court (see page 16 herein) and (3) clearly inapposite to justify the stated conclusion it asserts (see page 20 herein).

The nub of Joseph's case rests on the decision of the Supreme Court in Helvering vs. Horst 311 U.S. 112 (1940) where the doctrine of economic benefit was given an exhaustive analysis and was found to mandate realization of taxable income to a cash basis taxpayer in the year in which he "has fully enjoyed the benefit of the economic gain represented by his right to receive income." (emphasis added).

It is Joseph's position that in the year 1970-- while the award was held by his parents under restrictions imposed by the New York State Lottery Law and the EPTL, and no realistic assignment of such award could be made--that as a cash basis taxpayer he did not fully enjoy the benefit of the lottery award won by him but made payable to his parents in that year. If the Tax Court's position herein is upheld by this Court, it would mean that the Internal Revenue Service would receive over \$60,000 in tax on \$100,000 which Joseph could receive in 1970 only to the extent that it represented a payment determined by

his parents, as custodians, or a state court to be for his "support, maintenance, education and benefit."

It is respectfully submitted that Helvering v. Horst, would not consider such clear restrictions on Joseph's ability to use the lottery award in 1970 as "full enjoyment" thereof.

POINT I

THE TAX COURT ERRED WHEN IT
HELD JOSEPH, A CASH BASIS
TAXPAYER, REALIZED INCOME FROM
THE LOTTERY AWARD IN 1970 UNDER
THE ECONOMIC BENEFIT DOCTRINE

The Tax Court held that Joseph received "sufficient economic and financial benefits" from the lottery award in 1970 to cause taxation of the award thereon to Joseph in that year. According to the Tax Court, its opinion rests upon the "economic benefit" theory. However, nowhere in its opinion does the Tax Court define or otherwise elaborate on what it means by the economic benefit theory. Nor does the Tax Court indicate what it means by receiving "sufficient economic and financial benefits" (underscoring added) which would cause Joseph to have realized taxable income in 1970. Joseph could not, in 1970, use or enjoy the income represented by the lottery award unless his parents, in their discretion, allowed it or an appropriate state court upon

review of a petition by Joseph so ordered it.

Moreover, in Application of Muller 235 N.Y.S. 2d 125 (1962), where application was made, in part, for the use of alleged custodial funds for travel expenses to Europe, the Supreme Court, Special Term, New York County, held that "The use of the money by the children is sought, not for support, maintenance and education, as is usually contemplated, but rather for beneficial extraneous purposes" not within the purview of the predecessor provisions of Sec. 7-4.3 (b) of the EPTL.

Thus, if Joseph, in 1970 sought to purchase an automobile, travel on a European vacation, move to another residence, purchase somewhat more expensive clothes, make a gift, etc.--it is certainly questionable whether such personal wants (aside from those less dramatic as set forth above) could have been realized by Joseph from the lottery award through either parental consent or by Surrogate Court permission during 1970, the year in which Joseph's parents held the award. Moreover, for the reasons amply provided in the reply brief (see Argument II therein incorporated herein by reference) filed by Joseph in the Tax Court, it is highly unlikely that a reasonable person would chance purchasing by assignment Joseph's interest in the lottery award during 1970; a conclusion which the Tax Court assumed without deciding, for purposes of its opinion.

In view of the substantial restrictions and limitations on Joseph's ability to have full enjoyment of the lottery award in 1970, as fully set forth above, by what means did the Tax Court rely on the economic benefit theory to determine that Joseph, a cash basis taxpayer, realized taxable income from the award in 1970?

The theory by which a cash basis taxpayer is considered to realize income under the economic benefit doctrine has its source in, and was fully explored by, the Supreme Court in Helvering v. Horst 311 U.S. 112 (1940). The Tax Court opinion completely ignores the existence of Horst in which the Supreme Court states that realization during a taxable year to a cash basis taxpayer occurs when "he has fully enjoyed the benefit of the economic gain represented by his right to receive income" (emphasis added).

In Horst, the taxpayer, owner of negotiable bonds, detached negotiable interest coupons therefrom shortly before their due date and delivered them as gifts to his son, who in the same taxable year collected them at maturity. The Supreme Court held that the taxpayer should be taxed on the interest income gifted to his son since the taxpayer controlled the power to receive and dispose of the interest income, and therefore its enjoyment.

In Horst, the year of taxability to the

assignor was made easy since the taxable year included both the fact of assignment and the collection by the assignee of the interest income underlying the assignment. In Eubank v. Commissioner 311 U.S. 122 (1940), a companion case to Horst decided on the same day by the Supreme Court, the issue involved the taxable year of realization of income by an insurance agent where he made assignments in 1924 and 1928 of renewal commissions. The Supreme Court held that the insurance agent should be taxed in 1933, which was the year that the renewal commissions were actually paid.

Taken together, the Horst and Eubank opinions emphasize that a right to receive income during a taxable year does not result in a realization of such income to a cash basis taxpayer. Something more must be involved and that something more must be that the taxpayer must have "fully enjoyed the benefit of the economic gain represented by his right to receive income." In Horst, the fruition of the economic gain and therefore its "full enjoyment" occurred in the same year since assignment and collection were events transpiring in such year. In Eubank, the "full enjoyment" was postponed to the year of collection of the renewal commissions.

If the Tax Court opinion below is upheld, its effect would be to apply the accrual basis for reporting income to Joseph, a cash basis taxpayer. If the New

York State Lottery Law had provided that the State of New York would not pay lottery winnings (which were nonassignable) to a minor, until he reached age 21, surely it could not be argued that Joseph, a cash basis taxpayer, would realize taxable income in 1970, when he was 20 years of age. If such were the case, Section 446 of the Internal Revenue Code which authorizes the cash basis for reporting income becomes a nullity. Instead, the New York Lottery Law, together with the EPTL, provides that the payment of the lottery award should be made to an intervening entity, Joseph's parents, subject to real restrictions and limitations. Such lottery award while in his parents' custody, was not equivalent to cash to Joseph in 1970 and should not be treated as being "fully enjoyed" by him in that year. Whether held by the State of New York or by his parents, the result to Joseph is the same; he is not free to command or dispose of the funds in 1970 which represent the lottery award he had won.

POINT II

SINCE JOSEPH, AS A MATTER OF LAW
HAD NO RIGHT TO RECEIVE THE LOTTERY
AWARD IN 1970 EXCEPT UNDER THE
LIMITED CIRCUMSTANCES SPECIFIED IN
THE NEW YORK EPTL, HE SHOULD NOT BE
COMPELLED TO PAY A TAX ON FUNDS HE
COULD NOT BY LAW FULLY ENJOY THAT
YEAR

In 1970, Joseph suffered from a legal disability--under the New York Lottery Law he was a minor and could not enjoy the full and free use of the lottery award until he was 21 years of age in 1971.

The Supreme Court in Commissioner v. First Security Bank of Utah 405 U.S. 394 (1972) was faced with a similar issue. There, a holding company organized a subsidiary corporation to engage in the insurance business ("Life"); another subsidiary corporation was a national bank ("Bank"). Bank originated credit life insurance which was placed with an independent insurance company; however, pursuant to a treaty of reinsurance, the independent company reinsured the business with Life. The Internal Revenue Service sought to allocate a portion of Life's premium income to Bank as compensation for originating and processing the credit life insurance. Since court decisions construing 12 U.S.C. Section 92, prohibited a national bank from acting as an insurance agent, the Supreme Court held that the assignment of income doctrine and Section 482 could have no application where a

taxpayer has no right as a matter of law to receive the income in question. It stated that (at page 403):

"We know of no decision of this Court wherein a person has been found to have taxable income that he did not receive and that he was prohibited from receiving. In cases dealing with the concept of income, it has been assumed that the person to whom the income was attributed could have received it. The underlying assumption always has been that in order to be taxed for income, a taxpayer must have complete dominion over it. 'The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.' Corliss v. Bowers, 281 U.S. 376, 378 (1930)."

In its opinion, the Supreme Court (at page 406) refers with approval to the Tax Court's opinion in Paul A. Teschner 38 T.C. 1003 (1962). There, the taxpayer-father entered a contest which rules provided that prizes were only awardable to those under 17 years of age; contestants over age 17 were required to designate a person under that age to receive the prize. The Tax Court held that the father's mere power to direct the distribution of the prize was not sufficient to tax its value as income to him because he did not possess a right to receive the prize under the contest rules.

Both these decisions demonstrate that where a taxpayer is inhibited, as a matter of law or condition of eligibility, from receiving income during a taxable year, then he cannot be in realization of taxable income.

In Joseph's case, by operation of law he was prevented from receiving the lottery award in 1970--the year he had won it. At best, the lottery award could only be "siphoned" to him through the filter of the EPTL which conditioned its distribution to him on standards of "support, maintenance, education and benefit." Surely, even under the best of circumstances, such standards could not be valued at \$100,000 nor would they equate with "full enjoyment" as a cash equivalent to Joseph in 1970.

POINT III

THE TAX COURT'S RELIANCE ON THE
CASES CITED IN ITS OPINION IS
CLEARLY MISPLACED AND CERTAIN OF
ITS CONCLUSIONS CLEARLY CAVALIER
AND STRAINED

Analysis of the decisions upon which the Tax Court opinion relied to support its version of the economic benefit doctrine demonstrates its misapplication of the doctrine.

Stephen W. Pulsifer 64 T.C. 245 (1975) - This case involved an Irish sweepstake prize made payable to minors, which prize was held under Irish law with the Bank of Ireland and could not be released until the minors reached age twenty-one or until application on their behalf was made by their legal representative to an Irish court for release of the funds. The record was void of the

extent of the restrictions and limitations, if any, on the legal representative as to the disposition of such funds once in his possession; nor was there any evidence in the record showing whether the funds were assignable by the minors while held by the Bank of Ireland or their legal representative. The Tax Court held that the economic benefit doctrine controls the disposition of the case and that the minors realized taxable income in the year of the award. The Court also went on to say--without any citation of authority--that although the record did not contain any evidence of assignability of the award, its decision would be the same whether or not the right to the funds were assignable.

The Tax Court opinion herein holds that it is controlled by the Pulsifer facts and decision thereon. Counsel for Joseph would ask by what facts and legal conclusions would there be a similarity between Pulsifer and those herein? In Pulsifer, there is no indication of any limitation on disposition of funds once they were in the hands of the minors' legal representative. Here, Joseph's parents were holding the lottery award as custodians under power limitations imposed by the EPTL. Also, here as indicated in Joseph's reply brief submitted in the Tax Court proceeding (argument II), Joseph could not assign the funds until age 21 nor could any reasonable person be found as a purchaser of his interest because of the

cloud hanging over his right to the lottery funds until he reached age 21.

The Tax Court, in its opinion herein, reaches the cavalier conclusion that: "The mere absence of a right to assign has long been held not to constitute a valid reason for reaching a different result" (emphasis added) from that reached in Pulsifer. The Pulsifer opinion did not need the warrant of citation to support its opinion; it just stated that its decision would be unaffected by whether or not the lottery award was assignable.

With all due respect to the Tax Court, the conclusion drawn below is clearly inconsistent and at odds with its own opinions and with those opinions it employs to support its decision herein.

The Tax Court in a case it decided only four years ago, Candido Jacuzzi, 61 T.C. 262 (1973), made it clear that a principal distinction between the decision it was reaching in Jacuzzi and a decision by the Sixth Circuit in Drysdale v. Comm 277 F.2d 413 (6th Cir. 1960) is that:

"In Drysdale, the taxpayer did not have the right to assign his interest in the trust fund. Thus, the taxpayer did not receive a present economic benefit because it was not possible for him to receive the cash equivalent of his interest in the fund by assigning his interest.."

Indeed, in the Drysdale case, itself, which the Tax Court opinion herein incorrectly states was solely concerned with the doctrine of constructive receipt (see footnote "2" of Tax Court opinion herein), the Sixth Circuit Court of Appeals had this to say about the doctrine of economic benefit and how it is affected by lack of assignability:

"As an alternative ground for supporting the Tax Court's decision, the Commissioner asserts the economic benefit or cash equivalent theory. Under this doctrine, any economic or financial benefit conferred upon an employee as compensation is considered the equivalent of cash and taxable in the year when made. The Tax Court undertook no discussion of this theory except to refer to the case of Sproull v. Commissioner, 6 Cir., 194 F.2d 541. In that case, the trust agreement contained no restriction whatever on petitioner's right to assign or otherwise dispose of the interest created in him. In the present case, the taxpayer is restricted by the terms of both contracts from exercising any dominion over the funds in possession of the trustee. This is a crucial distinction. See Commissioner v. LoBue, 351 U.S. 243, 76 S. Ct. 800, 100 L.Ed 1142. The distinction is noted in the Tax Court's opinion in that case. We see no purpose of further discussion of Sproull." (emphasis added)

From the above, it is clear that the statement made in the Tax Court Opinion herein reducing the effect of the right to assign to "mereness" is incorrect, since the absence of a right of assignment was made a material distinction (from Drysdale) by the Tax Court in Jacuzzi and considered a "crucial" distinction from Sproull by

the Sixth Circuit Court of Appeals in Drysdale--the same Sixth Circuit Court of Appeals which had previously affirmed the Tax Court's decision in the Sproull case (infra). Moreover, the Opinion herein also incorrectly relies on employee compensation cases to support its conclusion. Thus, in addition to Sproull, the Opinion points to United States v. Drescher 179 F.2d 863 (2d Cir. 1950) and Renton K. Brodie 1 T.C. 275 (1942). These decisions stem from a specific edict in the Internal Revenue Code (Section 61 of the 1954 Code; Section 22 (a) of the 1939 Code) which "sweeps into gross income 'compensation for personal service, of whatever kind and in whatever form paid, ***, and income derived from any source whatever'" See Drescher 179 F.2d @ 864. This statutory edict was reinforced by the Supreme Court in Commissioner v. Smith 324 U.S. 177 (1945) holding that "taxable income includes any economic or financial benefit conferred on an employee as compensation whatever the form or means by which it is effected" (See Jacuzzi 61 T.C. @ 266). In Sproull, there was nothing to prevent the employee from realizing a cash equivalent of the amount placed in trust by his employer since he had the unconditional right to assign his interest. Thus, what he received in trust was equivalent to cash. In Brodie the question of the nonassignability of annuity contracts was not considered the crucial question. Rather, the premiums paid by the employer to

purchase annuity contracts for certain favored employees are found by the Tax Court to be intended as compensation and therefore equivalent to cash. The point was emphasized in Drescher, where this Court ~~stressed~~ the compensatory aspects of the premium paid to purchase a retirement annuity contract (cf. counsel for petitioner's appeal to the Second Circuit in Stevens v. Comm. 439 F.2d 69 (2d Cir. 1971) rev'g 28 TCM 711 involving the taxable economic protection given to the ex-wife afforded by insurance premiums paid by the ex-husband).

Compensation cases are not the key to determining whether the Petitioner herein realized income under the economic benefit or cash equivalent doctrine. A full exploration of the Supreme Court decision in Horst would, it is respectfully submitted, be the basis for a proper conclusion to be drawn herein.

The Horst opinion ~~requires~~ "full enjoyment" of what property or benefit is received during a taxable year by a cash basis taxpayer in order for "realization" of taxable income to occur during such year. As previously indicated and as the record amply demonstrates, Joseph's opportunity to enjoy the lottery award during 1970 was limited by the exercise of his parents' discretion as custodians or by review of an appropriate court upon petition by Joseph. In either event, such enjoyment was further limited in the exercise of parental or court discretion

to payments made for his "support, maintenance, education and benefit." Moreover, unlike Sproull, Joseph could not realize the cash equivalent of the lottery award placed in his parents' possession, as custodians, since such award was not freely assignable by him in 1970. It should also be emphasized that while the Tax Court opinion herein paid particular emphasis to the nonassignability factor herein, it is Joseph's position that such factor, together with all the other limitations and restrictions on Joseph's ability to fully enjoy the lottery award in 1970, prevented realization of the lottery award as taxable income to him in 1970.

One final comment. In straining to support its opinion herein, the Tax Court suggests that since the powers given to Joseph's parents under the EPTL were only of a short duration (April 13, 1970--the date the award was paid--to September 1, 1971--the outside date for distribution to Joseph since that was when he reached 21 years of age), such powers were "short-term management powers" and thus did not impose sufficient limitations on Joseph's enjoyment of the funds in 1970.

This conclusion, it is submitted, has neither a statutory nor judicial basis by which it could be supported. To suggest that the restrictions and limitations imposed by the New York State Lottery Law (which can be conceded to be an unrelated third party) may have different

Federal income tax results varying with the age of the minor winning the lottery,--based upon proximity to reaching majority--does not, with all due respect, have any warrant under the Internal Revenue Code.

The Tax Court Opinion refers for support for this proposition to City Nat. Bank & Trust Co. v. United States 109 F.2d 191 (7th Cir. 1940). That case involved short-term "trust" agreements in which the Court found that the grantor never really parted with control and management over property he "transferred" (cf. Sections 671-678 of the Internal Revenue Code of 1954). The Court had no problem in removing the facade of a trust and finding the existence of a principal-agent relationship; in effect, holding that the grantor continued his dominion over the property. It is difficult to reconcile such a transparent arrangement with the facts contained herein which involved restrictions imposed by the State of New York on the opportunity of a lottery award winner to fully enjoy the lottery award he won--as a result of a legal disability imposed upon him because of his age. The City Nat. Bank & Trust Co. case cannot justify the far-reaching conclusion reached by the Tax Court Opinion herein with respect to the effect on Joseph of the management powers given to his parents by the State of New York, which prevented Joseph from "full enjoyment" of the award.

It should be pointed out that the City National Bank & Trust Co. Opinion does make reference to decisions by the United States Supreme Court in Griffiths v. Helvering 308 U.S. 355 (1939) and Corliss v. Bowers 281 U.S. 376 (1930), which decisions emphasized that taxation does not rely upon "refinements of title" but rather on "actual command over the property taxed--the actual benefit for which the tax is paid." Under the Tax Court Opinion herein, Joseph would be taxed \$61,000 on a \$100,000 lottery award over which he had little or no command in 1970.

POINT IV

THE TAX COURT ERRED IN FAILING TO
APPLY THE CONCLUSION REACHED BY
RESPONDENT IN REVENUE RULING 59-154
TO THE LOTTERY AWARD AND/OR INCOME
EARNED THEREON IN 1970

The statutory notice of deficiency issued by respondent limited the issue herein to whether Joseph realized taxable income from the lottery award and income earned thereon in 1970. For the reasons previously stated it is respectfully submitted that Joseph has met his burden of proving that he did not realize taxable income in 1970 from the lottery award and/or income earned thereon in said year. Respondent argued below and the Tax Court opinion holds that the fiduciary income tax return filed by Joseph's parents for taxable year April 13, 1970 to

March 31, 1971 should not be recognized. That point is not in issue; only the question of realization of income to Joseph is involved herein. However, counsel for Joseph will confront that issue for purposes of this Court's review.

It is not clear why the Tax Court, in its opinion herein, reached its conclusion that the interest earned on the lottery award should not be treated as trust income without having made any reference to the underlying pertinent provisions of the Internal Revenue Code or Revenue Ruling 59-154, 1959-1 Cum. Bull. 160. A review of the pertinent provisions and the ruling is contained in Joseph's reply brief (Argument I) submitted in the Tax Court proceeding and is incorporated herein by reference. The gist of the ruling is that a power in trust involves obligations akin to an express trust and, as such, requires the grantee thereof to file a trust income tax return. It is noteworthy that the New York EPTL was amended in 1973 to allow for distributions to be made to a custodian under the terms of the Gifts to Minors provisions of Article 7 of the EPTL; thus, eliminating the burdensome requirements for disposition under a power in trust.

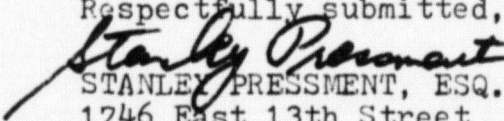
This change in New York law was clearly anticipated in an article covering the Uniform Gifts to Minors Act appearing in 49 Cornell Law Quarterly 12 (1963). At page 33 of said article, the author points out certain

procedural advantages of a custodian arrangement over a power in trust (e.g., an estate need not stay in administration until minor reaches age 21) but clearly suggests that substantively the duties of each are basically the same. It is therefore unclear as to why the respondent and the Tax Court opinion herein refuse to apply the rationale of Rev. Rul. 59-154 to support the appropriateness of the trust return duly filed by Joseph's parents during the period they held the lottery award as custodians.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be reversed and judgment entered in favor of the Appellant.

Respectfully submitted,


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
JOSEPH ANASTASIO, :
Appellant, :
-against- : Docket No. 77-4117
COMMISSIONER OF INTERNAL REVENUE, : CERTIFICATE OF
Appellee. : SERVICE BY MAIL
----- x

I, STANLEY PRESSMENT, attorney for Appellant,
hereby certify that on the 12th day of August 1977,
service of Appellant's brief was made by mailing three
copies to Appellee by post-paid mail, addressed as follows:

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